Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–137 OF 2008(W)
NIK HASHIM, AUGUSTINE PAUL, AND ZULKEFLI FCJJ
12 MARCH 2009

Administrative Law — Remedies — Habeas corpus — Three successive applications for writ of habeas corpus determined and dismissed by court — Whether doctrine of res judicata applicable to bar subsequent applications

Preventive Detention — Detention — Application for habeas corpus — Three successive applications filed by applicant — Grounds raised in third application available but not raised during second application — Whether applicant failed to put forward whole case in second application — Whether doctrine of res judicata would apply to bar third application — Whether common law doctrine of res judicata incorporated in Malaysian statute law — Courts of Judicature Act 1964 s 25(2)

The appellant was detained under the Internal Security Act 1960 ('ISA') pursuant to a detention order dated 13 December 2007. He filed for a writ of habeas corpus in the High Court at Kuala Lumpur on 19 December 2007 ('the first application'). The application was dismissed on 26 February 2008. The appellant appealed to the Federal Court which dismissed his appeal on 14 May 2008. On 30 May 2008, the appellant filed for a second writ of habeas corpus ('the second application'), which application was subsequently dismissed by the High Court at Ipoh on 8 September 2008. On 8 August 2008, the appellant filed his third application for the writ. In his grounds he submitted, inter alia, that after the issuance of the detention order by the first respondent on 13 December 2007 and after the dismissal of the appellant's first application for a writ of habeas corpus by the High Court on 26 February 2008, he had been elected as an ADUN to the Selangor State Legislative Assembly. This was one of the appellant's new grounds in filing his third application. The appellant contended that being an ADUN he would not have committed any act that caused a threat to the national security and that due to his continuous detention he could not carry out his responsibilities to the people who had voted him in as ADUN. At the outset of the hearing of the third application, the senior federal counsel ('SFC') raised a preliminary objection that none of the grounds raised fell under the

A ambit of an application for habeas corpus of a person detained under the ISA. The High Court allowed the preliminary objection and dismissed the appellant's third application for the writ of habeas corpus. The appellant thus filed the instant appeal to the Federal Court. At the appeal, the Federal Court directed counsel and the SFC to submit whether the common law doctrine
B of res judicata applied to the appellant's case.

Held, dismissing the appeal:

C (1) The common law doctrine of res judicata has been incorporated into the statute law in Malaysia as s 25(2) of the Courts of Judicature Act 1964 ('CJA') which confers additional powers to the High Court as set out in item 11 of the Schedule to the CJA. The inclusion of the common law doctrine of res judicata in item 11 of the Schedule under
D s 25(2) of the CJA reflects the intention of legislators in formulating a policy to address the issue of multiplicity or overlapping of legal proceedings (see paras 8 & 15).

(2) There would be exceptional cases where matters which should have been raised were not, but when raised in subsequent proceedings would
E not amount to an abuse of process and the plea of res judicata would not appear to be correctly taken as illustrated recently in *Rakesh a/l Ram Tawar v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2008] 4 MLJ 97 (distinguished) (see para 17).

F (3) In the instant case, the second application for a writ of habeas corpus was filed by the appellant after he became an ADUN on 8 March 2008. The points raised in the third application ought to have been raised in the second application. Therefore the doctrine of res judicata would apply. There were no special or exceptional circumstances shown by the
G appellant which would merit the preclusion of the doctrine of res judicata and the plea of an abuse of process. On the facts of the case, the appellant had not shown that he had put forward in his second application the whole of the case which was then fairly available to him (see para 18).

H

[Bahasa Malaysia summary

Perayu telah ditahan di bawah Akta Keselamatan Dalam Negeri 1960 ('ISA') menurut perintah tahanan bertarikh 13 Disember 2007. Perayu telah
I memfailkan writ habeas corpus di Mahkamah Tinggi Kuala Lumpur pada 19 Disember 2007 ('permohonan pertama'). Permohonan tersebut telah ditolak pada 26 Februari 2008. Perayu telah merayu ke Mahkamah Persekutuan yang juga telah menolak rayuannya pada 14 Mei 2008. Pada 30 Mei 2008, perayu telah memfailkan writ habeas corpus kedua ('permohonan kedua'), yang

mana permohonan tersebut kemudiannya ditolak oleh Mahkamah Tinggi Ipoh pada 8 September 2008. Pada 8 Ogos 2008, perayu telah memfailkan permohonan ketiganya bagi writ tersebut. Dalam alasannya, dia menghujahkan, antara lain, bahawa selepas pengeluaran perintah tahanan oleh responden pertama pada 13 Disember 2007 dan selepas penolakan permohonan pertama perayu untuk writ habeas corpus oleh Mahkamah Tinggi pada 26 Februari 2008, dia telah dipilih sebagai ADUN kepada Majlis Undangan Negeri Selangor. Ini adalah salah satu alasan baru perayu di dalam memfailkan permohonan ketiganya. Perayu menegaskan bahawa dengan menjadi seorang ADUN dia tidak akan melakukan apa-apa tindakan yang menyebabkan ancaman kepada keselamatan negara dan disebabkan penahanannya yang berterusan, dia tidak dapat menjalankan tanggungjawabnya kepada orang ramai yang mengundinya sebagai ADUN. Pada permulaan pendengaran permohonan ketiga, peguam kanan persekutuan membangkitkan bantahan awal bahawa alasan-alasan yang dibangkitkan tidak termasuk di dalam lingkungan permohonan habeas corpus bagi seseorang yang ditahan di bawah ISA. Mahkamah Tinggi membenarkan bantahan awal dan menolak permohonan ketiga perayu bagi writ habeas corpus. Perayu kemudiannya memfailkan rayuan ini ke Mahkamah Persekutuan. Ketika rayuan, Mahkamah Persekutuan mengarahkan peguam dan peguam kanan persekutuan untuk menghujahkan sama ada doktrin res judicata dalam *common law* terpakai dalam kes perayu.

Diputuskan, menolak rayuan:

(1) Doktrin res judicata *common law* telah digabungkan ke dalam undang-undang statut di Malaysia sebagai s 25(2) Akta Mahkamah Kehakiman 1964 ('AMK') yang mengurniakan kuasa tambahan kepada Mahkamah Tinggi seperti yang dinyatakan di dalam butiran 11 Jadual AMK. Kemasukan doktrin res judicata *common law* di dalam butiran 11 Jadual di bawah s 25(2) AMK, menggambarkan keinginan penggubal undang-undang dalam merumuskan polisi untuk menumpukan isu kepelbagaian atau pertindihan prosiding perundangan (lihat perenggan 8 & 15).

(2) Akan terdapat kes-kes luar biasa di mana perkara yang sepatutnya dibangkitkan tidak dilakukan, tetapi apabila dibangkitkan di dalam prosiding seterusnya tidak akan menyebabkan penyalahgunaan proses dan rayuan res judicata tidak dirumus secara betul seperti yang dijelaskan baru-baru ini di dalam kes *Rakesh a/l Ram Tawar v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2008] 4 MLJ 97 (dibeza) (lihat perenggan 17).

(3) Dalam kes ini, permohonan kedua untuk writ hebeas corpus telah difailkan oleh perayu selepas dia menjadi ADUN pada 8 Mac 2008.

A Perkara tersebut dibangkitkan di dalam permohonan ketiga sepatutnya telah dibangkitkan di dalam permohonan kedua. Oleh itu doktrin res judicata adalah terpakai. Tidak terdapat keadaan khas atau luar biasa ditunjukkan oleh perayu yang memeritkan penggunaan doktrin res judicata dan alasan penyalahgunaan proses. Berdasarkan fakta kes,
B perayu tidak menunjukkan yang dia telah mengemukakan di dalam permohonan keduanya keseluruhan kes yang diperolehi keseluruhannya (lihat perenggan 18).]

Notes

C For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 2005, Reissue) paras 580–634.

For cases on application for habeas corpus, see 10 *Mallal's Digest* (4th Ed, 2005, Reissue) paras 1306–1307.

D **Cases referred to**

Abhay Shridhar Ambulkar v SV Bhave, Commissioner of Police & Ors [1991] 4 CLJ (Rep) 453, SC (refd)

Hastings (No 2), Re [1958] 3 All ER 625, DC (refd)

E *Hastings (No 3), Re* [1959] 1 All ER 698, Ch D (refd)

Hastings (No 4), Re [1959] 3 All ER 221, CA (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914, FC (refd)

Rakesh a/l Ram Tawar v Timbalan Menteri Keselamatan Dalam Negeri,
F *Malaysia & Ors* [2008] 4 MLJ 97, HC (distd)

Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494; [1986] CLJ (Rep) 256, SC (refd)

Tarling, Re [1979] 1 All ER 981, QBD (refd)

G **Legislation referred to**

Constitution [India] art 32(2)
Courts of Judicature Act 1964 s 25(2), item 11 of the Schedule
Dangerous Drugs (Special Preventive Measure) Act 1985
Emergency Ordinance (Public Order and Prevention of Crime) 1969
H English Administration of Justice Act 1960 [UK] s 14(2)
Internal Security Act 1960 s 8

Appeal from: Criminal Appeal No 44–33 of 2008 (High Court Kuala
I Lumpur).

Sri Murugan (SR Sreedevi Naidu with him) (M Manoharan & Co) for the appellant.

Mohd Dusuki bin Mokhtar (Najib bin Zakaria with him) (Senior Federal Counsel, Ministry of Home Affairs) for the respondents.

Zulkefli FCJ (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the learned judge of the High Court in Kuala Lumpur who dismissed the appellant's application for a writ of habeas corpus vide Criminal Application No 44–33 of 2008. We heard the appeal on 17 February 2009 wherein we dismissed the appellant's appeal. We now give our reasons in arriving at our decision.

BACKGROUND FACTS

[2] The relevant background facts and chronology of events leading to the present appeal by the appellant are as follows:

[3] On 13 December 2007, the appellant was detained in Kamunting Detention Camp under the Internal Security Act 1960 ('ISA') and is still currently being detained there. He first filed for a writ of habeas corpus at the High Court in Kuala Lumpur vide Criminal Application No 44–90 of 2007 ('the first application') on 19 December 2007 challenging the validity of his detention under the ISA. The High Court dismissed the first application on 26 February 2008 and held his detention to be lawful. The appellant appealed to the Federal Court vide Criminal Appeal No 05–21 of 2008(W) against the said decision of the High Court. On appeal the Federal Court ruled, inter alia, that the detention order was validly issued under s 8 of the ISA and dismissed the appeal on 14 May 2008. Dissatisfied with the outcome, the appellant filed another writ of habeas corpus vide Criminal Application No 44–10 of 2008 in Ipoh High Court on 30 May 2008 ('the second application'). The application was dismissed by the Ipoh High Court on 8 September 2008. The appellant filed the third application for a writ of habeas corpus on 8 August 2008 vide Criminal Application No 44–33 of 2008 ('the third application') which is the subject matter of the present appeal. The reasons given by the appellant in support of his third application as affirmed in his affidavit on 8 August 2008 may be summarised as follows:

(1) the appellant being the elected representative to the Selangor State Legislative Assembly ('ADUN') could not have committed any act in any way that causes threat to the national security. Therefore, according to him the first respondent was wrong in issuing the detention order dated 13 December 2007;

(2) due to his continuous detention the appellant could not contribute to the people who voted him in;

(3) the appellant was not allowed to attend the sittings of the Selangor State Legislative Assembly scheduled for the 22, 23 and 26 May 2008 and he was forced to take leave which he claimed had tarnished the democratic process;

(4) the appellant is yet to get a reply to his request to attend the Selangor State Legislative Assembly; and

(5) the role played by Mohd Irza bin Dahari in signing the exh 'MM3' (letter informing the appellant that his request to be allowed to attend the Selangor State Legislative Assembly had been rejected by the first respondent) and the allegation of facts of the detention order which was also signed by him had caused a conflict of interest.

[4] At the outset of the hearing of the third application before the learned judge of the High Court, senior federal counsel appearing for the respondent raised a preliminary objection that none of the grounds in support of the application falls under the ambit of an application for habeas corpus of a person detained under s 8 of the ISA. After hearing both parties, the learned judge allowed the preliminary objection and dismissed the appellant's application for the writ of habeas corpus. The learned judge of the High Court in his judgment had stated that none of the above reasons relate to any procedural non-compliance on the part of the first respondent in issuing the detention order dated 13 December 2007. Even assuming that the above allegations by the appellant were true, the learned judge found that they still cannot be the basis for issuing a writ of habeas corpus because those allegations or grounds were not related to the legality of his detention under the ISA.

RES JUDICATA

[5] At the commencement of the hearing of the appeal before us, we directed learned counsel for the appellant and senior federal counsel for the respondents to submit whether the common law doctrine of res judicata applies to the appellant's case. We took this stand having noted that there are successive applications for a writ of habeas corpus made by the appellant after the Federal Court had dismissed the appellant's appeal under the first application.

[6] Res judicata is defined in *Black's Law Dictionary*, 7th Ed, as follows:

> [literally in Latin 'a thing adjudicated] 1 An issue that has been definitively settled by judicial decision. 2 An affirmative defence barring parties from litigating a second lawful lawsuit on the same claim, or any other claim arising from the same transactions and that could have been — but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue (2) a final judgment

on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. Restatement (Second) of Judgments ss 17, 24 (1982) — Also termed res adjudicata, claim preclusion. Cf COLLATERAL ESTOPPEL.

Res Judicata has been used in this section as a general term referring to all new ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgments. The first is the effect of foreclosing any litigation of matters that never been litigated, because of the determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing relitigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated, had gone under the name, 'true res judicata' or the names 'merger' and 'bar'. The second doctrine, preclusion of matters that have once been decided, has usually been called 'collateral estoppel' Professor Alan Vestal has long argued for the use of the names 'claim preclusion' and 'issue preclusion' for these two doctrines [*Vestal, Raitonale of Preclusion*, 9 St Louis U LJ 29 (1964)], and this usage is increasingly employed by the Courts as it is by Restatement Second of Judgment. Charles Alan Wright, *Law of Federal Courts s 100A*, at 722–723 (5th Ed 1994).

[7] George Spencer Bower and Sir Alexander Kingcome Turner in their book *The Doctrine of Res Judicata*, 2nd Ed at p 1 defined res judicata, inter alia, as follows:

21 In English jurisprudence a res judicata, that is to say a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for re-litigation between the same parties or their privies.

[8] The common law doctrine of res judicata has been incorporated into the statute law in Malaysia as can be found in s 25(2) of the Courts of Judicature Act 1964 ('CJA') which confers additional powers to the High Court as set out in item 11 of the Schedule to the CJA as follows:

11 Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or by reason of multiplicity of proceedings in any Court or Courts the proceedings ought not to be continued.

SUBMISSION OF PARTIES

[9] Learned counsel for the appellant submitted that a writ of habeas corpus is a public law remedy and it is a prerogative writ just as certiorari, prohibition and mandamus. The grant of habeas corpus is therefore as of right and not in the discretion of the court. It was contended for the appellant that as a general rule the doctrine of res judicata does not apply to public law

remedies. On the issue of whether the doctrine of res judicata or constructive res judicata is applicable when successive habeas corpus petitions or applications are filed, learned counsel for the appellant referred to us the position under the Constitution of India and case laws in India. In India it is enshrined in their Constitution that a detained person is at liberty to file application for habeas corpus to the Supreme Court irrespective of whether he had exhausted such right in the High Court by virtue of art 32(2) which states as follows:

> The Supreme Court shall have the power to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.

[10] Learned counsel for the appellant cited to us the case of *Abhay Shridhar Ambulkar v SV Bhave, Commissioner of Police & Ors* [1991] 4 CLJ (Rep) 453 where the Indian Supreme Court allowed the petitioner to raise new grounds under art 32 of the Indian Constitution even though the previous application for a writ of habeas corpus was dismissed. The Indian Supreme Court at p 454 of the judgment had this to say:

> Abhay Sridhar Ambulkar-petitioner has been detained under the National Security Act 1980 (the Act). The order of detention dated 12 February 1990 was issued by the Commissioner of Police, Greater Bombay, who is respondent 1 in these cases. The order was issued under s 3(2) of the Act with a view to preventing the petitioner from acting in any manner prejudicial to the maintenance of public order. The grounds of detention have been served to the petitioner along with the detention order. The petitioner challenged the validity of his detention in the High Court of Bombay by means of a writ petition under art 226 of the Constitution. The High Court has dismissed the writ petition. Against the judgment of the High Court, Special Leave Petition (Cri) No 1407 of 1990 has been preferred. Simultaneously, the petitioner has filed Writ Petition (Cri) No 1248 of 1990 under art 32 of the Constitution challenging the same order of detention by raising a new ground which have not been taken before the High Court.
>
> We have heard counsel for the petitioner, perused grounds of detention and the judgment of the High Court. The High Court has properly considered all the questions raised and we are in agreement with the conclusion reached by the High Court. The special leave petition is, therefore, rejected.

[11] Learned counsel for the appellant submitted that based on the above case law authority from India the doctrine of res judicata does not apply to the facts and circumstances of the present case. The appellant contended that he is raising new grounds under the third application on the basis that he is now an ADUN. To the appellant his applications for a writ of habeas corpus under the first application and the second application were dismissed by the High Court on different grounds.

[12] For the respondents, learned senior federal counsel submitted that in England prior to the coming into force of the English Administration of Justice Act 1960, the outcome of habeas corpus applications is not considered as a decision. Therefore it is permissible for detained persons who were not successful in the first attempt to obtain writ of habeas corpus to file subsequent habeas corpus applications. This issue was canvassed in *Re Hastings (No 2)* [1958] 3 All ER 625, *Re Hastings (No 3)* [1959] 1 All ER 698 and on appeal [1959] 3 All ER 221, CA. However, such a position ceased immediately after s 14(2) of the English Administration of Justice Act 1960 came into force which reads as follows:

> Notwithstanding anything in any enactment or rule of law where a criminal or civil application for habeas corpus has been made by or in respect of any person, no such application shall again be made by or in respect of that person on the same grounds, whether to the same court or judge or to any other court or judge unless fresh evidence is adduced in support of the application.

[13] Learned senior federal counsel for the respondents further submitted that we should not readily rely on the law of other jurisdictions in relation to the application of the doctrine of res judicata in Malaysia and that it is imperative for us to look into our own laws. On this point learned senior federal counsel referred us to the case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 wherein Abdul Hamid bin Mohamad FCJ (as he then was) at p 932 had this to say:

> Regarding the cases referred to by learned counsel for the appellant, we do not think it is necessary for us to consider the two Indian cases. They are decided according to the laws in India. It is always very dangerous to quote passages from judgments, especially from other jurisdictions, and apply them without knowing and considering the relevant written laws in such jurisdictions and without paying sufficient attention to our own written laws. Such reliance can lead our law astray as has happened in the past.

DECISION

[14] We noted that the thrust of the argument made by learned counsel for the appellant before us is that after the issuance of the detention order by the first respondent on 13 December 2007 and after the dismissal of the appellant's first application for a writ of habeas corpus by the High Court on 26 February 2008, he had been elected as an ADUN. To the appellant this is one of the new grounds in filing the third application. According to him, being an ADUN he would not have committed any act that causes a threat to the national security and that due to his continuous detention he could not carry out his responsibilities to the people who had voted for him.

[15] It is our judgment that the inclusion of the common law doctrine of res judicata in item 11 of the Schedule under s 25(2) of the CJA reflects the intention of our legislators in formulating a policy to address the issue of multiplicity or overlapping of legal proceedings. In this regard reference may be made to *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ (Rep) 256 where Abdoolcader SCJ, said at pp 498–499 (MLJ), p 261 (CLJ):

> The earlier action instituted by the respondent on 2 July 1985 and which was struck out sought relief on the ground of discrimination in breach of art 8 of the Constitution but in the present proceedings the grounds for relief have been augmented and declarations sought to the effect we have indicated earlier. The appellants plead res judicata in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 (at pp 165–166) and a catenation of cases to the like effect, namely, that the plea of res judicata applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time …
>
> The attempt by way of the instant proceedings to relitigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police and Ors* [1982] AC 529 (at p 542).

[16] It is also useful to refer to a passage from the book *The Law of Habeas Corpus*, 2nd Ed, by RJ Sharpe where it says at p 207:

> In both civil and criminal cases it is specifically provided that no application can be made more than once on the same grounds, unless some fresh evidence is adduced on the subsequent application. A subsequent application must be based upon evidence which is not only different, but which also could not reasonably have been put forward on the earlier application. An applicant is not permitted to proceed on one ground, reserving a separate ground for a renewed application, but must put forward on his initial application the whole of the case which is then fairly available to him.

[17] In arriving at our decision we do recognise the fact that there would be exceptional cases where matters which should have been raised were not, but when raised in subsequent proceedings would not amount to an abuse of process and the plea of res judicata does not appear to be correctly taken, (see the case of *Re Tarling* [1979] 1 All ER 981). This point was considered in our

local case of *Rakesh a/l Ram Tawar v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2008] 4 MLJ 97 wherein Nallini Pathmanathan JC said that given the somewhat exceptional facts of the case, the application of the doctrine of res judicata should be precluded. The learned JC in her well reasoned judgment said that the question that arises for consideration is whether the applicant 'held back' the arguments relating to mandatory procedural non-compliance, which he seeks to raise in the second application after having filed the first application for a writ of habeas corpus that had been dismissed. In that case, the applicant's first set of solicitors failed to raise in the first application any such issues, which if raised and found to be true, would have had some possibility of success. As drafted and put forward, the first application contained no merits warranting the issuance of an order of habeas corpus. This is because the entire basis for the first application was a challenge to the discretion exercised by the minister without any reasonable basis in arriving at his decision to issue the order of detention. The law in this area is clear, particularly since the decision of the Federal Court in *Lee Kew Sang v Timbalan Menteri Dalam Negeri & Ors*. In that case it was held that with the amendments to the Emergency Ordinance (Public Order and Prevention of Crime) 1969, the ISA 1960 and Dangerous Drugs (Special Preventive Measure) Act 1985 made by Act A740, Act A739 and Act A738 respectively, which came into force on 24 August 1989, challenges to the minister's detention order could only be based on one ground namely non-compliance with procedural requirements. Accordingly, the first application filed by the applicant was misconceived, in that it was premised on legal arguments that were doomed to failure under the law as it stands. To that extent the applicant was prejudiced in his first application by the failure of his first set of solicitors to appreciate the current position in law. The learned JC in her judgment took the view that from the facts it is clear that it cannot be said that the applicant 'held back' arguments that were available to him. On this point we wholly agree with the view expressed by the learned JC. The fact that the applicant's solicitors were not apprised of the current position in law on this issue cannot be attributed to the applicant as he relied entirely on their legal expertise.

[18] Having heard the submissions of learned counsel for the appellant and learned senior federal counsel for the respondents we are satisfied that the second application for a writ of habeas corpus was also filed by the appellant after he became an ADUN on 8 March 2008. We are of the view that the points raised in the third application before us ought to have been raised in the second application. Therefore the doctrine of res judicata applies. We find there are no special or exceptional circumstances shown by the appellant which would merit the preclusion of the doctrine of res judicata and the plea of an abuse of process. It is also to be noted that the appellant in the present case under appeal had filed three successive applications for a writ of habeas application in respect of the same detention order dated 13 December 2007.

Whatever the merits may be in the second application it is our judgment that the points raised in the third application ought to have been raised in the second application. On the facts of the case it has not been shown to us that the appellant had put forward in his second application the whole of the case which was then fairly available to him. For the reasons already stated we dismissed this appeal.

Appeal dismissed.

Reported by Andrew Christopher Simon